(4)

No. 08-1156

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC and
AT&T MOBILITY CORPORATION,

Petitioners,

v.

CHARLENE SHORTS and
PALISADES COLLECTIONS LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CHARLENE SHORTS

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QUESTION PRESENTED

In the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (2005), Congress amended several jurisdictional rules concerning removal. CAFA did not expressly alter the longstanding rule of *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), that counterclaim defendants cannot remove under 28 U.S.C. § 1441(a). When AT&T Mobility removed this action under § 1441(a) and CAFA, the district court remanded, applying *Shamrock Oil*. The question presented is:

Did CAFA silently supersede the *Shamrock Oil* rule and create removal jurisdiction for counterclaim defendants?

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Respondent Charlene Shorts opposes the petition filed by AT&T Mobility LLC and AT&T Mobility Corporation (jointly, ATTM) and respectfully submits this opposition brief.

JURISDICTION

The Court lacks jurisdiction over this appeal. CAFA explicitly incorporates 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," subject only to exceptions that are inapplicable here.[1] And the time allotted for appellate review under CAFA has expired. Furthermore, the well-pleaded complaint in this case fails to show any basis for federal jurisdiction.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case but omitted from those listed in the Petition: U.S. CONST. art. III, § 2; 28 U.S.C. § 1447(d); *id.* § 1453(c). These provisions are set forth in the Respondent Charlene Shorts's Appendix.

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1. *See* 28 U.S.C. § 1446(c)(1) ("Section 1447 shall apply to any removal of a case under this section . . . .").

2. The complaint in this action is for a state-law debt collection. ATTM's sole basis for federal jurisdiction is the counterclaim, which cannot supply federal jurisdiction on these facts. *See Vaden v. Discover Bank*, __ U.S. __, 129 S. Ct. 1262, 1277 n.17 (2009); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 829-30 (2002).

STATEMENT OF THE CASE

ATTM's assignee, Palisades Collections LLC, filed this action in state court in West Virginia. Pet.'s App'x (P.A.) at 2a. Palisades' suit seeks to collect from Shorts on her contract and account with ATTM's predecessor, Cingular and/or AT&T Wireless. *Id.* Shorts answered the suit and asserted counterclaims against Palisades under West Virginia's consumer protection statute and common law. *Id.* at 3a. Shorts sought leave to join ATTM as an additional counterclaim defendant to her counterclaims, each of which concerns the charges on her ATTM contract and account. *Id.* at 3a-4a. The state court granted Shorts leave to join ATTM under West Virginia's counterparts to Rules 13(h) and 19 of the Federal Rules of Civil Procedure. ATTM conceded joinder in the state court proceeding. P.A. at 3a.

Shorts pleaded some of her counterclaims on behalf of herself and ATTM's similarly situated West Virginia customers, and she sought class certification under West Virginia's counterpart to Rule 23. P.A. at 4a. ATTM removed the action under CAFA and 28 U.S.C. § 1441(a). P.A. at 4a. Relying on this Court's decision in *Shamrock Oil*, the U.S. District Court for the Northern District of West Virginia concluded that ATTM is not a defendant who can remove under § 1441(a). P.A. at 4a-5a. The district court also rejected ATTM's argument that CAFA created a new removal procedure independent of § 1441 (P.A. at 5a), and it declined to exercise its discretion to realign ATTM as a defendant who can remove (*see* P.A. at 19a). The Fourth Circuit affirmed.

REASONS FOR DENYING THE PETITION

Following the "near-canonical rule" from *Shamrock Oil*, the Fourth Circuit held that counterclaim defendants such as ATTM cannot remove under § 1441(a) or CAFA. For 68 years, Congress has legislated against the backdrop of *Shamrock Oil* and its progeny, demonstrating its ability to expressly create counterclaim-based removal jurisdiction when it intended to do so.[3] The lower courts have followed *Shamrock Oil* uniformly, not once denying a remand motion following removal by a counterclaim defendant. The Fourth Circuit simply followed suit. Thus, ATTM's petition offers no opportunity for the Court to resolve a split of authority, and it raises no important issue of federal law that has not been previously resolved by the Court. None of the Court's Rule 10 factors are in play.

More importantly, and completely unaddressed by ATTM and its amicus, the Court is without jurisdiction over this appeal.

A. The Court Lacks Jurisdiction Under § 1447(d) To Review The District Court's Remand Order.

ATTM relied on the limited exception to 28 U.S.C. § 1447(d)'s restrictions on appeals of remand orders to obtain review in the court of appeals. The strict time

3. *See, e.g.*, 28 U.S.C. § 1452 ("A party may remove any claim or cause of action [related to bankruptcy cases]."); 19 U.S.C. § 337(c) ("Immediately after a counterclaim is received by the [International Trade] Commission, the respondent raising such counterclaim shall file a notice of removal with a United States district court . . . .").

limits for that review have now passed, however, and ATTM provides no justification for ignoring those limits now. Congress made it clear that appellate jurisdiction over remand orders would be narrowly circumscribed both in § 1447(d) and again in the CAFA by making its removal provisions explicitly subject to § 1447.

Article III, section 2, of the Constitution gives Congress the authority to limit the Court's appellate jurisdiction in any non-original action: "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." U.S. CONST. art. III, § 2. Congress exercised its authority in creating the jurisdictional bar in § 1447(d), which provides in relevant part that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). Although CAFA modifies § 1447(d), it lifts the jurisdictional bar only for an abbreviated review by the courts of appeals—not this Court:

> Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed [subject to strict time limits].

28 U.S.C. § 1453(c).

In this Court, § 1447(d) is a complete bar to appellate jurisdiction. *See Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947).[4] Nothing in the exception created by § 1453(c) can be construed to reach these proceedings as the exception allowing for review in the court of appeals expires after sixty days. *See* 28 U.S.C. § 1453(c)(2). And Congress could hardly have been more explicit in exercising its Article III authority: a remand order "is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d).[5] It is of course a first

4. *See also Kloeb v. Armour & Co.*, 311 U.S. 199, 204 (1940).

5. None of the recognized exceptions to § 1447(d) apply. Because ATTM attempted to effect removal as a counterclaim defendant, the removal was defective under § 1447(c), and the district court lacked subject matter jurisdiction. There is no applicable statutory exception, the remand order was issued for reasons contemplated by § 1447(c), and there was no ruling on the merits. In this circumstance, a remand order is not reviewable on appeal or otherwise:

> The parties do not dispute that the District Court's order remanded this case to the Ohio state court from which it came. There is also no dispute that the District Court remanded this case on grounds of untimely removal, precisely the type of removal defect contemplated by § 1447(c). Section 1447(d) thus compels the conclusion that the District Court's order is "not reviewable on appeal or otherwise."

Things Remembered v. Petrarca, 516 U.S. 124, 128 (1995); *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723 (1977) ("The District Court's remand order was plainly within the bounds of § 1447(c) and hence was unreviewable by the Court of Appeals, by mandamus or otherwise."); *see also Things Remembered*, 516 U.S. at 128 ("Absent a clear statutory command to the contrary, we assume that Congress is 'aware of the universality of the practice' of denying appellate review of remand orders when Congress creates a new ground for removal." (quoting *United States v. Rice*, 327 U.S. 742, 752 (1946))).

principle that this Court exercises appellate jurisdiction when reviewing the decisions of lower courts. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147-48 (1803).

Neither is it surprising that Congress declined to provide, in CAFA, for an appeal to the Supreme Court. ATTM's August 2007 Notice of Removal is nearly two years old already. Further review would be contrary to the notions of respect and comity that have traditionally informed both Congress and the courts in this arena.

In *United States v. Rice*, the Court attributed these notions in § 1447(d) to congressional policy: "Congress, by the adoption of [the predecessor to § 1447(d)], established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." 327 U.S. 742, 751 (1946).[6] In enacting CAFA, Congress preserved this policy, albeit with exception, tailoring a minimalist,

6. Both federalism and judicial economy inform this policy:

> Removal in diversity cases, to the prejudice of state court jurisdiction, is a privilege to be strictly construed, and the state court proceedings are to be interfered with once, at most. This is not only in the interest of judicial economy, but out of respect for the state court and in recognition of principles of comity. The action must not ricochet back and forth depending upon the most recent determination of a federal court.

In re La Providencia Dev. Corp., 406 F.2d 251, 252 (1st Cir. 1969); *cf. State of Ohio v. Wright*, 992 F.2d 616, 619 (6th Cir. 1993) ("The result of the removal has been to delay the administration of justice in the case in the state courts for more than five years.").

truncated review period in the courts of appeals only. That exception has run its course, and ATTM is no longer permitted to interrupt the state-court proceedings below.

Remarkably, neither ATTM's petition nor the amicus brief of the Chamber of Commerce makes any reference to § 1447(d). Shorts submits that their silence speaks volumes.

Likewise, the well-pleaded complaint of the Plaintiff below, Palisades, plainly shows no basis for federal jurisdiction. Federal courts look to the well-pleaded complaint, not counterclaims or third-party pleadings to determine whether an action is removable. *See Vaden v. Discover Bank*, __ U.S. __, 129 S. Ct. 1262, 1277 n.17 (2009); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 829-30 (2002).

B. There Are No Compelling Reasons Or Exceptional Circumstances That Justify Review.

1. No Conflict of Authorities Exists.

ATTM's petition meets none of the reasons for review in this Court's Rule 10. ATTM concedes there is no circuit split to resolve. Pet. at 10. It identifies no conflicting authority from a state court of last resort or this Court. It cannot argue a departure from the usual course of judicial proceedings because, since *Shamrock Oil*, counterclaim defendants have never been allowed to remove under § 1441(a).[7]

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7. Also, ATTM cites no case, and Shorts can find none, that purports to allow removal pursuant to CAFA independent of § 1441(a).

Indeed, for as long as the general removal statute has authorized the "defendant or defendants" to remove, federal courts have consistently restricted that authority to original defendants.[8] ATTM points to no exception to the rule. Instead, it asks the Court to grant its petition to consider whether, for nearly 70 years, the central holding of *Shamrock Oil* has been misconstrued.

A long line of cases uniformly follows *Shamrock Oil*, holding each and every time that counterclaim defendants, *including additional counterclaim defendants*, cannot remove.[9] ATTM and its amicus

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8. The rule denying removal to counterclaim defendants is as old as our Republic. In the Judiciary Act of 1789, Congress granted a right of removal to "the defendant." Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (1845). In *West v. Aurora City*, the Supreme Court interpreted these words to mean that a plaintiff could not remove the case when a counterclaim falling within federal jurisdiction was asserted against it. 73 U.S. 139, 142 (1867). For a brief period between 1875 and 1887, Congress repealed this rule, granting the right of removal to "either party." Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 471 (1875). In 1887, however, Congress enacted the predecessor to the present § 1441(a), reverting to a removal authority only for "the defendant or defendants." Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553 (1887). From there, the language migrated, with the slight change to "the defendant or the defendants," into § 1441(a). *Shamrock Oil* addressed the immediate predecessor to § 1441(a).

9. *See, e.g.*, *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1017-18 (9th Cir. 2007) (class action); *CitiFinancial, Inc. v. Lightner*, No. 5:06-cv-00145, 2007 WL 3088087, at *4-5 (N.D. W. Va. Oct. 22, 2007) (same); *Ford Motor Credit Co. v. Jones*, No. 1:07-cv-728, 2007 WL 2236618, at *8-10 (N.D. Ohio July 31, 2007) (same);

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suggest that the decision below conflicts with authority that has allowed removal by counterclaim defendants—namely the Fifth Circuit's *State of Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998), and a total of two district court decisions, *Mace Securities International, Inc. v. Odierna*, No. 08-cv-60778, 2008 WL 3851839 (S.D. Fla. Aug. 14, 2008), and *H&R Block, Ltd. v. Housden*, 24 F. Supp. 2d 703 (E.D. Tex. 1998). *See, e.g.*, Pet. at 26 n.12. But they fail to inform the Court that all three cases address removal *not* under § 1441(a) but under § 1441(c). This distinction renders these cases inapposite, because § 1441(c) explicitly provides for

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Unifund CCR Partners v. Wallis, No. 06-cv-545, 2006 WL 908755, at *3 (D.S.C. Apr. 7, 2006) (same); *Williamsburg Plantation, Inc. v. Bluegreen Corp.*, 478 F. Supp. 2d 861, 862 (E.D. Va. 2006) (same); *Great E. Resort Corp. v. Bluegreen Corp.*, No. 5:06-cv-00084, 2006 WL 3391504, at *3 (W.D. Va. Nov. 22, 2006) (same); *Dartmouth Plan, Inc. v. Delgado*, 736 F. Supp. 1489, 1492 (N.D. Ill. 1990) (same pre-CAFA); *Capitalsource Fin., LLC v. THI of Columbus, Inc.*, 411 F. Supp. 2d 897, 900 (S.D. Ohio 2005) (non-class case); *Rodriguez v. Fed. Nat'l Mortgage Ass'n*, 268 F. Supp. 2d 87, 90 (D. Mass. 2003) (same); *Green Tree Fin. Corp. v. Arndt*, 72 F. Supp. 2d 1278, 1282 (D. Kan. 1999) (same); *Starr v. Prairie Harbor Dev. Co.*, 900 F. Supp. 230, 232-233 (E.D. Wis. 1995) (same); *OPNAD Fund, Inc. v. Watson*, 863 F. Supp. 328, 334 (S.D. Miss. 1994) (same); *Tindle v. Ledbetter*, 627 F. Supp. 406, 407 (M.D. La. 1986) (same); *see also Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 686 (9th Cir. 2005) (as support for an argument on a different CAFA issue, citing *Shamrock Oil* for the proposition that § 1441 "is quite clear that only a 'defendant' may remove the action to federal court"); *FIA Card Servs., N.A. v. Gachiengu*, No. 07-cv-2382, 2008 WL 336300, at *6 n.4 (S.D. Tex. Feb. 5, 2008) (agreeing in *dicta* that a counterclaim class-action defendant cannot remove).

removal of later-joined, separate and distinct claims *only when the claims are based on federal-question jurisdiction*. Section 1441(a), by contrast, does not. Shorts's counterclaim is based on state law and raises no federal question, which puts § 1441(c), and ATTM's cases, entirely out of the picture.

Even setting aside the critical § 1441(a)/§ 1441(c) distinction, the authority cited by ATTM would provide no basis for review in light of the Court's pronouncement in *Holmes Group* that "a counterclaim—which appears as part of the defendant's answer, not as part of the plaintiff's complaint—cannot serve as the basis for 'arising under' jurisdiction." 535 U.S. at 829-30. The recent decision in *Vaden* is even more explicit—and relevant:

> [A] party's ability to gain adjudication of a federal question in federal court often depends on how that question happens to have been presented . . . . When a litigant files a state-law claim in state court, and her opponent parries with a federal counterclaim, the action is not removable to federal court, even though it would have been removable had the order of filings been reversed. . . . [H]ypothesizing about the case that might have been brought does not provide a basis for federal-court jurisdiction.

129 S. Ct. 1262, 1277 n.17 (2009).[10]

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10. Because § 1441(c) does not apply, it is unnecessary to explore the constitutional difficulties with which § 1441(c) is fraught. *See Porter v. Roose*, 259 F. Supp. 2d 638 (S.D. Ohio 2003).

If *Holmes Group*, 535 U.S. at 832, was not clear enough in refusing "to transform the longstanding well-pleaded-complaint rule into the 'well-pleaded-complaint-or-counterclaim rule,'" then *Vaden*, 129 S. Ct. at 1278, resolves all doubt in pronouncing that "federal jurisdiction cannot be invoked on the basis of a defense or counterclaim." Where federal-question counterclaims in *Holmes Group* and *Vaden* were insufficient to invoke federal jurisdiction, Shorts's state-law counterclaim can do no better.

In the face of uniformly contrary authority, ATTM nonetheless argues that *Shamrock Oil* should be, in effect, limited to its facts. Thus, ATTM suggests that the case, at most, stands for the principle that a plaintiff may not remove. Not so. *Shamrock Oil* did more than reject removal by a "plaintiff"; it categorically excluded counterclaim defendants from those "defendants" who are authorized to remove under the general removal statute. In fact, in its conclusion, the *Shamrock Oil* Court disclaimed any reliance on the rationale that the plaintiff/counterclaim defendant had waived the right to remove by initiating the suit: "one does not acquire an asserted right by not waiving it, and the question here is not of waiver but of the acquisition of a right which can only be conferred by Act of Congress." 313 U.S. at 108.

2. ATTM Overstates The Issue's Importance And The Likelihood That It Will Recur Frequently.

The only other rationale ATTM can muster in favor of granting review in the absence of a genuine conflict is its opinion that the issue is of "national importance" and likely to be recurring frequently.[11] But even there, the only support ATTM offers is a law review article that, although it suggests the issue is likely to be repeated, goes on to meticulously detail why CAFA cannot be construed to allow counterclaim-defendant removal, at least not without running afoul of the Constitution and numerous canons of statutory construction.[12] ATTM's reliance on academic interest in the issue is telling, as it sometimes happens that academic articles on an issue vastly outnumber the actual, substantive cases under discussion and

11. Notably, the case is in no sense "national" as the proposed class is entirely made up of West Virginians.

12. *See* Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. ST. U. L. REV. 193, 196 (2007) ("CAFA might have shifted the tide of class action practice toward the federal shore, but it has left some wading room for state courts to contribute to the development of the law of class actions."); *id.* at 215-16 ("[T]he conclusion that section 1441 does not authorize the removal of counterclaim class actions results from an uncomplicated, almost mundane, exercise in legal reasoning. The combination of a clear text ('the defendant or the defendants'), an on-point Supreme Court decision (*Shamrock Oil*), a bedrock jurisdictional canon (the rule that the court's jurisdiction must appear on the face of the complaint), and a sensible interpretive policy (strict construction in order to allow state courts the greatest authority to decide cases brought under state law) is too much to overcome.").

exaggerate the importance of the few there are.[13] In fact, as to both recurrence and importance, ATTM's claim that the issue is significant and will recur frequently is belied by the dearth of actual cases on point. In the four years since CAFA was enacted, only *six* counterclaim class actions have been removed to the federal courts—and none successfully.[14]

The reality is that joinder rules limit the use of class action counterclaims. Those rules do not allow unrelated counterclaims or unrelated counter-defendants to be joined willy-nilly. Even if some state court were to allow it, the doctrines of fraudulent joinder and realignment empower district courts to adequately manage the situation.[15] Only in the narrow situation presented here, where the counterclaims and additional counterclaim defendants are closely intertwined with the issues raised in the complaint itself, will a counterclaim be joined to the original civil action. The term "class action additional counterclaim defendant" sounds rare and exotic because it is.

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13. *See generally* Christopher Regan, *A Whole Lot of Nothing Going On*, 75 NOTRE DAME L. REV. 797, 797-99 n.4 (2000).

14. *See* note 9, *supra*.

15. In this case, ATTM conceded joinder but, after removal, tried to realign. PA. at 43a, 48a. The district court found that ATTM was not misaligned on the facts before it. P.A. at 52a. The mainspring of the action was the attempt by Plaintiff, Palisades, to seek damages from Shorts. P.A. at 51a-52a. Far from uninvolved, ATTM (through its predecessor in interest) is a necessary part of these claims. P.A. at 52a. Each of Shorts's counterclaims involves charges on her ATTM contract and account. *Id.* (noting that "both [ATTM and Palisades] are accused of the same violations"). The joinder and realignment rules work, as they did in this case.

C. The Text and Legislative History Of CAFA Supports The Decision Below.

Undeterred by its inability to wrest a conflict from the case law, ATTM urges the Court to grant review to consider whether there is a conflict between the decision below and CAFA's text or legislative history. Unabashedly, it represents in its Question Presented that CAFA says qualifying class actions "may be removed to a district court of the United States * * * by any defendant." Pet. at i. Yet CAFA no more says this than the First Amendment says "Congress shall make no law." In both instances, the omitted portion of the sentence is essential.

The Fourth Circuit recited and applied CAFA correctly. It noted express changes in § 1453—the provision ATTM creatively excerpts—to the rule in *Chicago, Rock Island & Pacific Railway Co. v. Martin*, 178 U.S. 245, 248 (1900), that all defendants must unanimously consent to removal, the complete-diversity rule of *Strawbridge v. Curtiss*, 7 U.S. 267, 267-68 (1806), and the one-year deadline for removal under 28 U.S.C. § 1446(b). But as to the rule from *Shamrock Oil*, the Fourth Circuit acknowledged that § 1453 is silent.

In ATTM's view, this silence must be construed as repealing *Shamrock Oil*. The Fourth Circuit rightly discredited that notion:

> [W]e . . . recognize that it is our duty, as a court of law, to interpret the statute as it was written, not to rewrite it as ATTM believes Congress could have intended to write it. If

> Congress intended to make the sweeping change in removal practice that ATTM suggests by altering the near-canonical rule that only a "defendant" may remove and that "defendant" in the context of removal means only the original defendant, it should have plainly indicated that intent.

P.A. at 18a-19a.[16] To hold otherwise would violate the principle of construction explained in *Whitman v. American Trucking Associations*: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." 531 U.S. 457, 468 (2001).

Last, ATTM argues that CAFA's legislative history—a questionable Senate Report[17]—evinces an

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16. *See also Shamrock Oil*, 313 U.S. at 108 (constitutional limits on federal power require the Court to strictly construe the jurisdiction-conferring statute in favor of remand); *id.* at 106 (the Court must assume that Congress knew the legal backdrop against which it was legislating); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (where Congress has amended a body of law, those parts that remain unchanged are presumed to have been left alone on purpose).

17. AT&T's reliance on the Senate Report is undermined significantly by the report's silence on counterclaims and *Shamrock Oil*. The Senate Report is also of dubious integrity, as it was signed by only 13 senators and was issued 10 days *after* CAFA's enactment. *See Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006). To the extent that legislative history serves as legitimate evidence of congressional intent, it does so only

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intent to expand federal jurisdiction to reach this case. It is anemic, at best, to argue that CAFA's policy can accomplish implicitly what Congress did not do expressly. Every circuit court to address this argument has rejected it.[18] But even if gleaned congressional intent or policy were

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because it is presumed to have been ratified by Congress and the President when the relevant legislation was enacted. *See* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1522 (2000); *see also Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring). That did not occur with respect to the Senate Report on CAFA, which, as noted, was signed by a handful of senators and released after the President signed the legislation into law.

18. *See, e.g.*, *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 296 (4th Cir. 2008) (refusing, in the absence of explicit language, to construe CAFA as altering the "near-canonical rule" placing the burden of proving federal jurisdiction on the removing party); *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007) (noting that, even after CAFA, "federal courts are courts of limited jurisdiction which we will strictly construe"); *Galeno*, 472 F.3d at 58 (rejecting the notion that CAFA's policy obliterates Congress's refined alterations in the field of removal jurisprudence); *Morgan v. Gay*, 471 F.3d 469, 472-73 (3d Cir. 2006) (holding that CAFA's general policy is not "an indication that Congress intended to shift long- and well-established" law); *Saab v. Home Depot U.S.A., Inc.*, 469 F.3d 758, 759-760 (8th Cir. 2006) (declining to read CAFA's appeal provision broadly to permit appeal of remand order otherwise not facially authorized); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1329-30 (11th Cir. 2006) (holding that appeals "to CAFA's 'overriding purpose' are unavailing in the face of CAFA's silence on the traditional, well-established rules that govern the placement of the burden of proof and the resolution of doubts
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a sufficient basis for both rejecting strict construction of jurisdiction-conferring statutes and presuming that Congress was ignorant of the legal backdrop against which it legislated, even then, there is no basis for inferring that Congress intended that all or even most class actions should end up in federal court. CAFA certainly does not require that any class action be filed in or removed to federal court. It creates *concurrent* jurisdiction with state courts; it neither preempts state-court jurisdiction nor exhibits any such intent. In fact, in many circumstances, CAFA will require district courts to remand class actions despite the presence of minimal diversity.[19] It is therefore difficult, to say the least, to infer that Congress intended any particular case to be litigated in federal court.[20]

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in favor of remand"); *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676, 685 (9th Cir. 2006) (applying a rule of strict construction to CAFA); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (holding that, to change the presumption in favor of remand, "Congress must enact a statute with the President's signature (or by a two-thirds majority to override a veto)"); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1097 n.7 (10th Cir. 2005) (noting congressional intent to expand jurisdiction but stating that "general sentiments do not provide *carte blanche* for federal jurisdiction over a state class action").

19. *See* 28 U.S.C. § 1332(d)(4) (requiring remand where at least one primary defendant and two-thirds of the class are citizens of the forum state, regardless of the amount in controversy).

20. Indeed, CAFA's legislative history suggests that most class actions will remain in state court:

> During Committee debate on previous versions of this bill [CAFA], the most frequently expressed concern was that its jurisdictional provisions would

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ATTM's position is also difficult to square with much of the Senate Report on which it relies. That Senate Report plainly contemplates that CAFA removal is pursuant to the general removal provisions of § 1441(a) rather than § 1453.[21] As previously explained, this means incorporation—not rejection—of the rule from *Shamrock Oil*. Finally, a prior draft of CAFA, which was considered *and rejected* by Congress, purported to allow removal by additional parties—class-member plaintiffs.[22] Having decided against altering this removal rule expressly, Congress should not be presumed to have altered it silently.

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> overload the federal judiciary. That argument, however, ignores three key facts. First, the bill will not move most class actions to federal court. . . . [A] recent study debunked the myth promoted by some of the bill's critics that S. 5 will move nearly all class actions to federal court.

S. REP. No. 109-14, at 51-52 (2005).

21. *See id.* at 48 (citing and quoting § 1441(a) for the proposition that, "like other removed actions, matters removable under this bill may be removed only 'to the district court of the United States for the district and division embracing the place where such action is pending'"); *id.* at 49 (citing § 1441(a) for the proposition that "[t]he Act does not, however, disturb the general rule that a case can only be removed to the district court of the United States for the district and division embracing the place where the action is pending").

22. *See* S. 1751, 108th Cong., § 5(a) (Oct. 17, 2003) (early draft of CAFA allowing removal by class-member plaintiffs, which was considered and rejected by Congress).

In short, the Fourth Circuit correctly held that neither CAFA's text nor its legislative history undercut *Shamrock Oil*'s rule that counterclaim defendants cannot remove. If ATTM wishes to change the rule, it should appeal to Congress.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — UNITED STATES CONSTITUTION ARTICLE III, § 2

United States Constitution Article III, § 2

> Clause 1: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> Clause 2: In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Appendix A

Clause 3: The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

APPENDIX B — 28 U.S.C. § 1447(d)

28 U.S.C. § 1447(d)

28 U.S.C. § 1447. Procedure after removal generally

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

APPENDIX C — 28 U.S.C. § 1453(c)

28 U.S.C. § 1453(c)

28 U.S.C. § 1453. Removal of class actions

(c) Review of remand orders.

(1) In general. Section 1447 [28 USCS § 1447] shall apply to any removal of a case under this section, except that notwithstanding section 1447(d) [28 USCS § 1447(d)], a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

(2) Time period for judgment. If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

Appendix C

(3) Extension of time period. The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal. If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.